

1 HONORABLE RONALD B. LEIGHTON
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 DONALD LEE HOSKIN and BLANCHE
11 JANE HOSKIN, a married couple,

12 Plaintiffs,

13 v.

14 PIERCE COUNTY DEPUTY SHERIFF
15 ROBERT LARSEN, personally and in his
16 official capacity, et al.

17 Defendant.

18 NO. C06-5559 RBL

19 ORDER DENYING PIERCE COUNTY
20 DEFENDANT'S MOTION FOR
21 SUMMARY JUDGMENT

22 THIS MATTER comes before the Court upon Defendants' Motion for Summary Judgment.

23 Dkt. #17. The Court has considered the pleadings filed in support of and in opposition to the motion and
24 the entire file herein. For the reasons stated below the motion is DENIED.

25 **PROCEDURAL BACKGROUND**

26 Plaintiffs allege that on January 22, 2004 deputies of the Pierce County Sheriff's Department and
27 officers of the Washington Department of Corrections (DOC) violated their constitutional rights and
28 inflicted physical and emotional injuries. Dkt. #1. The confrontation took place at plaintiffs' home as
defendants searched for Hoskins' son, Corey, who was wanted for probation violations.

In their complaint, plaintiffs claim that Mr. Hoskin was unlawfully arrested and that defendants used excessive force in effecting the arrest. *Id.* They also claim their Fourth Amendment rights were violated during an unlawful search of their home. *Id.* Corresponding state law claims for negligently

1 causing physical injuries to Mr. Hoskin, negligently causing emotional distress to Mrs. Hoskin and for
 2 trespass are also included in the complaint. *Id.*

3 The complaint was originally filed in Pierce County Superior Court on September 12, 2006. The
 4 action was removed to this Court on September 27, 2006. *Id.*

5 The instant motions were filed on August 27 and 28, 2007. Dkt. #s 17, 20. Plaintiffs have
 6 withdrawn their negligent infliction of emotional distress claim, Dkt. #24, and their wrongful arrest claim,
 7 Dkt. #26. The DOC defendants settled all claims with plaintiffs on October 4, 2007. Dkt. #31. The
 8 negligence claim against the Pierce County Defendants was dismissed on October 18, 2007. Dkt. #34.

9 Claims that remain include 42 U.S.C. §1983 alleging use of excessive force and unlawful search
 10 and the state law claim of trespass.

11 FACTUAL HISTORY

12 A. The Search for Corey Hoskin.

13 Between 1999 and 2001, Corey Hoskin was arrested twice for domestic violence. Dkt. #24-3. He
 14 was convicted on one incident for third degree assault. *Id.*; 17-7, Ex. 23. The other incident did not result
 15 in a conviction. *Id.*

16 In March of 2002, Hoskin, along with others, was involved in a high speed chase with police. Dkt.
 17 #17-8, Ex. 30. When apprehended he identified himself as Brandon Hoskin, his brother. *Id.* Corey was
 18 arrested for attempting to elude police and for second degree identity theft. *Id.* Significantly, a knife and
 19 two 9mm bullets were found in the chase vehicle. *Id.*

20 On May 12, 2003, Hoskin was contacted by Community Correction Officers (CCOs) and fled. Dkt.
 21 17-8, Ex. 27. Property belonging to Hoskin was found in a nearby stolen vehicle. *Id.*

22 Hoskin's record also includes a conviction for second degree possession of stolen property. Dkt.
 23 #17-8, Ex. 28.

24 At the time of the subject incident sheriff's deputies considered Hoskin to be a dangerous offender
 25 as he had previously threatened to kill people, brandished weapons on multiple occasions, had a long
 26 history of drug abuse and had been seen several times leaving an area while armed with a pistol. Dkt. #17-
 27 2, Ex. 2. Notwithstanding this history, DOC had Hoskin on low level supervision indicating he was not
 28 considered a violent or high-risk offender. Dkt. #21-2.

1 As of January 22, 2004, Hoskin had failed to report to the DOC as a required condition of
 2 probation. Dkt. #17-2, Ex. 1. Moreover, he had failed to complete his treatment program, had consumed
 3 methamphetamine and had failed to notify DOC of a change of address. *Id.* A warrant for his arrest had
 4 been issued. *Id.*

5 **B. Residence of Corey Hoskin.**

6 According to DOC records, Hoskin resided at 14720 190th Avenue KPN, the same address as the
 7 plaintiffs/parents. Dkt.#17-7, Ex. 23; 17-8, Ex. 24-28. Defendant Holton (CCO), has testified that Corey
 8 Hoskin would not have been allowed to live with his parents. Dkt. #28-8. Indeed, Mrs. Hoskin testified
 9 that her address was never listed with DOC as Corey's residence. Dkt. #21-3. She claims that Corey's
 10 DOC-approved residence was with his grandmother, Mrs. Chadwick, who lived down the drive at 14719
 11 190th Avenue KPN. *Id.* While CCO Holton and CCO Ager were told that Corey lived with his
 12 grandmother, they checked plat maps and concluded that the Hoskin residence and the Chadwick residence
 13 were on the same property. Dkt. #21-8. The plaintiffs claim the property was legally divided in 1984. Dkt.
 14 #21-3.

15 Less than a year before the subject incident, CCOs Holton and Ager went to Chadwick's home to
 16 verify that Corey was living there. Dkt. #21-8. A search of the premises revealed only one drawer of socks
 17 belonging to Corey. *Id.* While the officers were still at the Chadwick residence, they observed Corey drive
 18 past the Chadwick residence to his parents' home. *Id.* The officers followed and requested to search the
 19 Hoskin residence. Dkt. #17-5, Ex. 6. Permission to search was refused whereupon Corey was handcuffed
 20 and taken back to the Chadwick residence. *Id.*

21 On May 5, 2003, DOC received an anonymous call that Corey was no longer living at his listed
 22 address. Dkt. #17-8, Ex. 28. Corey was found on May 12, 2003 at a non-listed residence but he fled from
 23 CCOs Holton and Ager. *Id.* That was the last contact DOC had with Corey before the incident involving
 24 his parents. There was some speculation by the DOC and the Federal Marshals that he may have fled to
 25 Hawaii, but the basis of that speculation is uncertain at this time. Dkt. #17-2, Ex. 1; 21-8.

26 **C. The Confrontation of January 22, 2004.**

27 A tipster advised the DOC that Corey Hoskin had returned to the area, was armed, and might be at
 28 his parents' property. Dkt. #17-2, Ex. 1. The tipster, a known drug user under DOC supervision, was

1 considered credible. *Id.* Although Corey's assigned CCO (Hilpert) was on sick leave at the time, CCO
2 Holton contacted Hilpert's supervisor and "briefed her on the situation." Dkt. #21-8.

3 The plan for January 22, 2004 called for DOC officers and sheriffs deputies to divide into two
4 teams to search the Hoskin residence and the Chadwick residence. Dkt. #17-3, Ex. 3. The events giving
5 rise to this dispute occurred at the Hoskin residence.

6 When the team assigned to the Hoskin residence approached, Mrs. Hoskin emerged from the house
7 carrying a concealed handgun. Dkt. #17-4, Ex 5. She was either relatively calm (Mrs. Hoskin, Dkt. #21-3)
8 or highly agitated and yelling (the defendants, Dkt. #17-4, Ex. 4) as she confronted the assembled officers.
9 Mrs. Hoskin was never searched. Dkt. #17-4, Ex 5.

10 Mr. Hoskin next exited the home and he too was carrying a concealed weapon in his front shirt
11 pocket. Dkt. #17-4, Ex 5. He looped around the back of a circular driveway to confront a person he saw
12 standing by a "civilian-looking" car on the bridge at the end of the drive. Dkt. #24-4. When he got to the
13 car no one was there. *Id.*

14 Mr. Hoskin says that, while at the bridge, he observed DOC Officer O'Neal emptying five-gallon
15 buckets of fish food out of Hoskin's pump house. Dkt. #24-4. He yelled at O'Neal to get out of the shed
16 as he walked calmly toward Deputy Sheriff Larsen. *Id.* Hoskin told Larsen that the officers were
17 trespassing and needed to leave. *Id.* Larsen told Hoskin that they were there on official government
18 business and did not need a warrant. *Id.*

19 Mr. Hoskin recalls that Deputy Larsen asked if Hoskin had a gun, then put his hand out and asked
20 for it. Dkt. #17-4, Ex 5. Hoskin says he put his hands out to the side and told Larsen that he did not want
21 to touch the gun. *Id.* Larsen then removed the gun from Hoskin's pocket. *Id.* Hoskin disputes Larsen's
22 account that the weapon actually had a bullet in the firing chamber. *Id.* He says that Larsen took the safety
23 off, loaded the chamber, then jammed a stick in the gun to keep it from firing. *Id.*

24 After being disarmed, Hoskin claims Larsen told him to "assume the position." Dkt. #17-4, Ex 5.
25 Hoskin says he told Larsen he didn't understand and that Larsen then spun him around and shoved him into
26 a sheriff's car. *Id.* According to both plaintiffs, Larsen then kicked Hoskin's ankles apart which caused
27 pain to Hoskin due to his bad hip. Dkt. #21-3. Hoskin says Larsen grabbed him by the hair, picked him up
28 and slammed him onto the ground face first. Dkt. #21-4.

1 After Hoskin was on the ground, Mrs. Hoskin said he was handcuffed by two deputies other than
 2 Larsen. Dkt. #21-3. The couple says that Larsen then picked up Hoskin from a prone position by his
 3 handcuffs and dropped him, face-first, on the ground. *Id.* According to Mrs. Hoskin, as Mr. Hoskin was
 4 placed in the patrol car, he had three red lasers shining on him from the officers assault rifles trained on
 5 him. *Id.* Plaintiffs claim that some of the officers involved in the incident were wearing ski masks to conceal
 6 their identity. Dkt. #1.

7 Not surprisingly, defendants tell a different story of Mr. Hoskin's arrest. Deputy Larsen says he
 8 never asked Hoskin to "assume the position" and that he never forced Hoskin up against a vehicle. Dkt.
 9 17-3, Ex. 3. He says he told Hoskin he needed to pat him down for more weapons. *Id.* Hoskin resisted by
 10 backing away. *Id.* At that point, Larsen says he used a leg sweep movement and gently brought Hoskin to
 11 the ground on his back. *Id.* CCO Bailey, however, says Larsen used a "Two Hand Hair Hold" to get
 12 Hoskin to the ground. Dkt. #24-6.

13 Deputy Larsen claims that Hoskin was resisting as he and Deputy Hopkins handcuffed him. Dkt.
 14 17-4, Ex. 4. According to Larsen, once Hoskin was handcuffed, he assisted Hoskin to his feet, patted him
 15 down, and placed him in the patrol car without further incident. *Id.* The defendants deny that anyone wore
 16 masks or pointed a gun at either Mr. or Mrs. Hoskin, or even had a rifle equipped with a laser scope. Dkt.
 17 #17-4, Ex. 4; 17-5, Ex. 8; 17-7, Ex. 21, 22.

18 **D. The Search.**

19 Mrs. Hoskin claims that Deputy Larsen threatened to arrest Mr. Hoskin if she did not consent to a
 20 search of her home. She alleges that Larsen knew that Hoskin would lose his job if he were arrested.
 21 According to Mrs. Hoskin, no one actually told her that her husband would be arrested if she did not
 22 consent to the search. Dkt. #20-2. She formed that impression, however, because on multiple occasions
 23 she was asked to consent while Larsen continued to administer the Miranda Warnings to her husband
 24 within earshot. Dkt. #24-3. Mrs. Hoskin claims that at one point she told Larsen that she would consent
 25 to a search so that he would not arrest her husband. *Id.*

26 For his part, Larsen says he merely Mirandized Hoskin and took him to a patrol car in case Hoskin
 27 decided to make any incriminating statement. Dkt. #17-3, Ex. 3. He denies that he was creating the
 28 appearance that Hoskin was being arrested. *Id.*

Mrs. Hoskins says she asked Deputy Larsen if she could choose two people to go into the house for her. Dkt. #24-3. She chose CCO Bailey and CCO Ager. *Id.* A law enforcement officer, Deputy Myron, accompanied the two CCOs according to department protocol. Dkt. #24-6

DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt.”). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809, F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a genuine issue of material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. If one version of alleged facts are blatantly contradicted by the record so that no reasonable jury could believe those facts, the court should not adopt that version of the facts for purposes of summary judgment. *Scott v. Harris*, 127 S.Ct. 1769 (2007). The nonmoving party may not merely state that it will discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson*, *supra*). Conclusory,

1 non specific statements in affidavits are not sufficient, and “missing facts” will not be “presumed.” *Lujan v.*
 2 *National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

3 **B. Title 42 U.S.C. § 1983 Claims**

4 Section 1983 provides as follows:

5 Every person who, under color of any statute . . . of any State . . . subjects, or causes to be
 6 subjected, any citizen of the United States or other person within the jurisdiction thereof to the
 7 deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be
 liable to the party injured.

8 42 U.S.C. § 1983. In this case, “person” means the individual Sheriffs’ Deputies in their individual
 9 capacity.¹ To “subject” another to the deprivation of a constitutional right means to personally participate
 10 in the deprivation by performing an affirmative act, participating in another’s affirmative act, or failing to
 11 perform an act required by law. *Preschooler II v. Clark County School Bd. Of Trustees*, 479 F.3d 1175,
 12 1183 (9th Cir. 2007) (citing *Johnson v. Duffy*, 177 F.3d 839, 854 (9th Cir. 1978)). Defendants may also
 13 be liable for causing an individual to be subjected to a constitutional deprivation by setting in motion a
 14 series of acts by others that the defendants knew or reasonably should have known would cause a violation
 15 of the plaintiffs’ constitutional rights. *Id.*

16 Under the doctrine of qualified immunity, government officials are immune from suit unless their
 17 actions violate clearly established law. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Qualified immunity
 18 is the right to be immune from suit. *Id.* at 526. The question of whether a defendant is entitled to qualified
 19 immunity must be resolved early in the proceedings to preserve this right. *Id.* Determining whether a
 20 defendant is immune from suit is a two-step inquiry: First, the plaintiff must demonstrate a violation of a
 21 constitutional right. The inquiry ends here if the plaintiff does not satisfy this prong. To determine
 22 whether this prong is satisfied, the court views the allegations in the light most favorable to the injured
 23 party. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In other words, the court asks whether taking all the
 24 allegations as true demonstrates a violation of a right secured by the Constitution.

25
 26
 27 ¹ Plaintiffs’ complaint stated a claim against the Sheriffs’ Deputies in their official capacity which is equivalent to stating
 28 a claim against the Pierce County Sheriff’s Department. *See Will v. Michigan*, 491 US 58, 71 (1989) Because plaintiffs
 subsequently denied they had any claim against the Pierce County Sheriff’s Department Dkt. #24, this Court assumes that
 plaintiffs have abandoned the claim against the Sheriffs’ Deputies in their official capacity.

1 Second, the plaintiff must demonstrate that the constitutional right was clearly established. *Id.* A
 2 right is clearly established if “it would be clear to a reasonable officer that his conduct was unlawful in the
 3 situation he confronted.” *Id.* at 202. Plaintiffs may not overcome qualified immunity by invoking abstract,
 4 general, but clearly recognized rights. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Rather, the right
 5 must be recognized in a particularized way so that the government officer may reasonably anticipate its
 6 violation. *Id.* at 639-40. If both prongs of the analysis are satisfied, the defendant is not entitled to
 7 qualified immunity and summary judgment or dismissal is not appropriate.

8 **1. Excessive Force under the Fourth Amendment**

9 The Hoskins claim that Deputy Larsen used excessive force when he “shoved” Mr. Hoskin against
 10 a vehicle, pulled him over backwards by his hair, lifted him off the ground from the prone position and
 11 dropped him, then tugged up on his handcuffs when walking him to and from the sheriff’s vehicle. While
 12 the complaint states that other Pierce County Deputies are also liable for excessive force, the Hoskins do
 13 not make specific allegations against the other deputies.

14 **a. Qualified Immunity**

15 The Pierce County Deputies contend they are entitled to qualified immunity because Mr. Hoskin
 16 was carrying a weapon, was unresponsive to the officer’s commands, and the only force used against Mr.
 17 Hoskin was a “simple leg sweep” necessary to execute a pat down. To determine whether the Pierce
 18 County Deputies are entitled to qualified immunity on this claim, the Court must first determine whether
 19 the Hoskins’ allegations amount to a constitutional violation and then whether the constitutional right was
 20 clearly established at the time of the incident. *See Saucier*, 533 U.S. at 201.

21 **i. Violation of a Constitutional Right**

22 For the Hoskins to state a claim under 42 U.S.C. § 1983 for a Fourth Amendment violation, they
 23 must allege that the officers use of force was unreasonable. *See Graham v. Connor*, 490 U.S. 386, 396
 24 (1989). The “reasonableness” of the use of force is determined objectively by weighing the intrusion on
 25 the individual’s right against the competing governmental interest. *Graham*, 490 U.S. at 396. The test is
 26 applied by viewing all of the facts and circumstances from the “perspective of a reasonable officer on the
 27 scene, rather than with 20/20 vision of hindsight.” *Id.* The court balances the quantum of force used
 28 against the following factors: (1) severity of the crime at issue, (2) whether a person poses an immediate

1 threat to the safety of others, (3) whether a person is actively resisting arrest or attempting to flee, (4)
 2 whether the officer could have used less force to attain his objective. *Davis v. City of Las Vegas*, 478 F.3d
 3 1048, 1055 (9th Cir. 2007).

4 The plaintiffs are basing their claim on Deputy Larsen's actions in detaining Mr. Hoskin. The facts
 5 as alleged by the plaintiffs support the conclusion that Deputy Larsen's treatment of Mr. Hoskin was
 6 unreasonable. The Ninth Circuit has held that an unnecessarily painful detention may be unconstitutional.
 7 *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir. 1994). The Ninth Circuit has also previously held that
 8 unjustifiably causing pain by handcuffing a person too tightly is unconstitutional. *Palmer v. Sanderson*, 9
 9 F.3d 1433, 1436 (9th Cir. 1993). If Deputy Larsen acted as alleged, the force used against Mr. Hoskin
 10 would be unreasonable. Mr. Hoskin was not suspected of committing a crime. The force was applied after
 11 Mr. Hoskin was disarmed and patted down. Concerns for officer safety could therefore have been ensured
 12 without lifting or tugging Mr. Hoskin by the handcuffs.

13 For the other deputies to be liable for Deputy Larsen's actions, the plaintiffs would need to allege
 14 and present facts to support the claim that these officers were "integral participants" in Mr. Hoskin's
 15 unconstitutional seizure. *See Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004). "Integral
 16 participation" does not require that each officer's individual action amount to a constitutional violation. *Id.*
 17 However, it does require some fundamental involvement in the conduct that caused the violation.
 18 *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 fn. 12 (9th Cir. 2007).

19 The Hoskins asserted that two other officers assisted Deputy Larsen in handcuffing Mr. Hoskin.
 20 While they did not provide evidence regarding the identity of those officers, the defendants stated that
 21 Deputy Hopkins assisted Deputy Larsen in handcuffing Mr. Hoskin. Dkt. #17-4, Ex. 4. An officer is an
 22 integral participant in the constitutional violation when he assists in handcuffing a person and the
 23 constitutional violation culminates from that action. *Blankenhorn*, 485 F.3d at 481 fn. 12. Therefore,
 24 Deputy Hopkins is liable for any excessive force used by Deputy Larsen.

25 The plaintiffs do not meet their burden to show that the other deputies either directly violated their
 26 constitutional rights or were "integral participants" in Deputy Larsen's actions. Therefore, the Hoskins
 27 have not established that any other deputy has violated their Fourth Amendment right by the use of
 28 excessive force.

ii. Clearly Established Right

The Court must now determine whether the constitutional rights allegedly violated by Deputy Larsen were clearly established such that a reasonable government officer would understand the conduct at issue to be unlawful. A reasonable government official would understand the alleged actions of Deputy Larsen to be unlawful. Even Officer Larsen testified that lifting someone up by the handcuffs who is in a prone position on the ground would constitute “torture.” Dkt. #21-5.

Deputy Hopkins was on notice in January 2004 that he would also be liable for a constitutional violation which culminated from his assistance in handcuffing a person. *Blankenhorn* was directly on point regarding this conduct. While *Blankenhorn* was not decided until 2007, the court stated that defendants in that case reasonably could have known they would be liable based on *Chuman v. Wright*, the 1996 case defining “integral participant.” *Blankenhorn*, 485 F.3d at 481 Fn. 12 (citing, as supporting authority, *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996)).

Deputy Larsen and Deputy Hopkins are not entitled to qualified immunity.

b. Summary Judgment on the Merits

The Pierce County Defendants also contend that they are entitled to summary judgment on the merits. Summary judgment for excessive force claims should be “granted sparingly . . . because such cases almost always turn on a jury’s credibility determinations.” *Davis v. City of Las Vegas*, 478 F.3d 1048, 1055 (9th Cir. 2007). Summary judgment will not be granted if the Hoskins show a genuine issue of fact that refutes the Pierce County Defendants’ contention that the force used on Mr. Hoskin was reasonable. *See Graham v. Connor*, 490 U.S. 386, 394 (1989).

Summary judgment on this issue must be denied because the Hoskins have raised several genuine issues of material fact such that the “reasonableness” of the officers’ actions cannot be determined as a matter of law.

2. Unlawful Search under the Fourth Amendment

The Hoskins contend that the Pierce County Sheriff's Deputies violated their Fourth Amendment right to be free from an unreasonable search. They allege that Deputy Myron violated their constitutional right by searching their home. They further allege that Deputy Larsen is also liable for that violation because he coerced consent to the search by creating the impression that Mr. Hoskin would be arrested if

1 Mrs. Hoskin did not consent to the search. The plaintiffs have not specifically alleged that any other
 2 deputy is liable for an unlawful search.

3 **a. Qualified Immunity**

4 The Pierce County Deputies claim they are entitled to qualified immunity. The Court will examine
 5 whether the search violated the Hoskins' constitutional right and whether that particular right was clearly
 6 established. *See Saucier*, 533 U.S. at 201.

7 **i. Violation of a Constitutional Right**

8 To state a claim under 42 U.S.C. § 1983 for a Fourth Amendment violation, the plaintiffs must
 9 allege that the defendants conducted an unreasonable search. *Samson v. California*, 126 S. Ct. 2193, 2197
 10 (2006). Under the Fourth Amendment, the Court examines the totality of the circumstances to determine
 11 whether a search is reasonable. *Id.* Reasonableness is determined by weighing the intrusion on the
 12 individual's privacy right against the promotion of a legitimate governmental interest. *Id.* A warrantless
 13 search is presumptively unreasonable apart from a few narrow exceptions. *Brigham City, Utah v. Stuart*,
 14 126 S. Ct. 1943, 1947 (2006) (internal citations omitted).

15 The plaintiffs are basing their claim on the search performed by Deputy Myron. The Pierce County
 16 Defendants contend that the warrantless search by Deputy Myron did not violate the Hoskins' Fourth
 17 Amendment rights because (1) Mrs. Hoskin's consent to the search was voluntary, or, in the alternative,
 18 (2) the search was a lawful parole search.

19 Voluntary consent will transform a warrantless search into a reasonable search. *Georgia v. Randolph*, 547 U.S. 103, 128 (2006) (citing *Illinois v. Rodriquez*, 497 U.S. 177, 183 (1990)). The Pierce
 20 County Defendants have the burden to prove that consent was voluntary from the totality of the
 21 circumstances. *See United States v. Patayan Soriano*, 361 F.3d 494, 501 (9th Cir. 2004). The Court
 22 considers the following factors: (1) whether the person was in custody; (2) whether the officers had their
 23 guns drawn; (3) whether Miranda warnings were given; (4) whether the individual was notified that he or
 24 she had the right to withhold consent; and (5) whether the individual was told that a search warrant could
 25 be obtained. *Patayan Soriano*, 361 F.3d at 502 (citing *United States v. Jones*, 286, F.3d 1146, 1152 (9th
 26 Cir. 2003)).

1 Cir. 2002)).²

2 Taking the facts in the light most favorable to the plaintiffs, Deputy Myron has failed to show
 3 that Mrs. Hoskin's consent was voluntary. First, the Hoskins allege that Mr. Hoskin was in police custody
 4 and an arrest would have dire consequences for them. Second, Deputy Larsen does not dispute that he
 5 Mirandized Mr. Hoskin. Third, the officers did not tell Mrs. Hoskin that she had the right to withhold
 6 consent or that a search warrant could be obtained. In addition to those factors, the following
 7 circumstances suggest that the consent was not voluntary: Mrs. Hoskin refused consent to a search in
 8 2003; and, she refused consent until after she heard Deputy Larsen read Mr. Hoskin his Miranda rights.
 9 The facts as alleged by plaintiffs indicate that any consent to search the residence was coerced, not
 10 voluntary.

11 A "reasonable parole search" conducted by law enforcement officers without a warrant does not
 12 violate the Fourth Amendment. *Montley v. Parks*, 432 F.3d 1072, 1079 (9th Cir. 2005) (en banc). The
 13 officers must have a "reasonable belief" that a suspect named in an arrest warrant or a parolee lives in the
 14 third party's home. The officer's belief must be supported by "some heightened knowledge that they are at
 15 the address where either the parolee or the subject of an arrest warrant resides." *Id.* The "reasonable
 16 belief" standard is equivalent to the probable cause standard. *Id.* at 1080 (citing *United States v. Gorman*,
 17 314 F.3d 1105, 1111-15 (9th Cir. 2002)). Cases in which the Ninth Circuit has held that the officers had a
 18 "heightened knowledge" of a parolee's residence, the parolee did not appear to be residing at any other
 19 address, the officers directly observed the parolee using the residence just before the search; and, the
 20 parolee had a key to the residence.³ *United States v. Howard*, 447 F.3d 1257, 1265-66 (9th Cir. 2006).

21 The police must obtain a search warrant if the police have probable cause to believe the parolee is
 22 present at another person's home but do not have probable cause to believe he is an actual resident. *United*
 23 *States v. Harper*, 928 F.2d 894, 896 (9th Cir. 1991)(internal citations omitted).

24 Deputy Myron has not met his burden to show that he had a "reasonable belief" that Corey Hoskin

26 _____
 27 ²While these factors were applied in criminal proceedings, the Court is satisfied that they apply with equal vitality in
 this civil case.

28 ³The court, in *Howard*, lists a fourth consideration for determining whether a parolee was a resident: whether the parolee
 or a third person stated that the parolee lived at the residence. However, the court also reasoned that a co-resident's statement
 about where the parolee lives is not credible because the co-resident frequently has his or her own interest at stake.

1 resided at his parents' house at the time of the search. The record is unclear regarding how much
 2 information the officers had about Corey's residence. However, even if the officers had the same
 3 information as the DOC, it was not enough to justify a parole search. First, the officers did not know
 4 whether Corey was residing at another address. Not only was there speculation that Corey lived in Hawaii,
 5 Dkt. #21-8, the officers checked both the Hoskin residence and the Chadwick residence because they were
 6 uncertain which one was Corey's residence, Dkt. #17-2, Ex. 1. Second, none of the officers had seen
 7 Corey using the residence. Third, nothing in the record suggests Corey had a key to his parents' house.
 8 The facts alleged, if true, would establish that the officers did not have a "reasonable belief" that Corey
 9 Hoskin resided at his parents' home.

10 The plaintiffs allege that Deputy Larsen is also liable for the unlawful search because he coerced
 11 Mrs. Hoskin's consent. Larsen is liable if his involvement contributed to the unconstitutional actions of
 12 another. *See Blankenhorn*, 485 F.3d at 481 fn. 12. Based on the facts as alleged, Deputy Larsen is liable
 13 for the unconstitutional search because the search was conducted only after Deputy Larsen coerced Mrs.
 14 Hoskin to consent.

15 The plaintiffs have not alleged facts showing that any other officer unlawfully searched their home
 16 or "integrally participated" in the violation by Myron. Because plaintiffs have not shown that the unnamed
 17 officers, with the exception of Deputy Hopkins, violated plaintiffs' constitutional rights, the unnamed
 18 officers are entitled to qualified immunity.

19 **ii. Clearly Established**

20 The Court must now determine whether the constitutional rights allegedly violated by Myron and
 21 Larsen were clearly established such that a reasonable officer would understand the conduct at issue to be
 22 unlawful.

23 First, a reasonable officer would know that consent given under the threat of having a family
 24 member arrested would be coercive. In fact, both CCO Bailey and Deputy Myron testified that they would
 25 not consider consent to be voluntary if a person only consented under the threat of serious consequences.
 26 Dkt. #24-6; 17-2, Ex. 2.

27 Second, the law clearly establishes that, at the time, officers would not have a reasonable belief
 28 regarding where a parolee was residing when that belief is based on the following factors: an

1 uncorroborated tip; the parolee's presence in the driveway ten months earlier; an address on the record
 2 which was previously regarded as incorrect. The Ninth Circuit has previously held that an anonymous tip
 3 and the fact that the suspected parolee answered the door in his boxer shorts was insufficient to give
 4 officers a reasonable belief that the suspect resided at that home. *Watts v. County of Sacramento*, 256 F.3d
 5 886, 890 (9th Cir. 2001).

6 Third, the law is clearly established that an officer would be liable for an unlawful search when he
 7 coerced a person to consent to that search. A reasonable officer would know that the coercion would lead
 8 to an unconstitutional search.

9 Deputy Larsen and Deputy Myron are not entitled to qualified immunity for the unlawful search
 10 claim.

11 **b. Summary Judgment Discussion**

12 In addition to claiming qualified immunity, the defendants move to dismiss this claim on the merits.
 13 However, the plaintiffs have raised genuine issues of material fact including (1) whether Mrs. Hoskin only
 14 gave consent under the threat of Mr. Hoskin's arrest, and (2) whether the officers had a reasonable belief
 15 that Corey Hoskin resided at his parents' home.

16 **C. Common Law Trespass**

17 The common law tort of trespass is an "intrusion onto the property of another that interferes with
 18 the other's right to exclusive possession." *Bosteder v. City of Renton*, 155 Wn.2d 18, 50 (2005) (quoting
 19 *Phillips v. King County*, 136 Wn.2d 946, 957 (1998)). A person has interfered with another's exclusive
 20 possession if he intentionally enters land or causes a third person to do so even if the person does not harm
 21 any legally protected interest. *See Peters v. Vinatieri*, 102 Wn. App. 641, 655 (2000) (citing Restatement
 22 (second) of Torts § 158 (1965)). However, a person is not a trespasser if that person is given express or
 23 implied permission to enter the premises. *See Singleton v. Jackson*, 85 Wn. App. 835, 839 (1997) (citing
 24 *Winter v. Mackner*, 68 Wn.2d 943, 945 (1966)). Also, a person may be privileged to enter another's
 25 property if the entry is reasonably necessary for that person to perform a duty or exercise authority created
 26 by the legislature if all the requirements of the legislative enactment are fulfilled. *Id.* (citing Restatement
 27 (second) of Torts § 211 (1965)).

The Pierce County Defendants are not entitled to summary judgment on this claim because, as discussed above, the plaintiffs have raised genuine issues of material fact including (1) whether the officers were given permission to enter the house, and (2) whether the officers were privileged by their duties as officers. Therefore, the summary judgment motion on the trespass claim is DENIED.

D. Motion to Strike

The plaintiffs filed a surreply requesting the Court to strike Pierce County Defendants' reply brief because it was filed a week after the noting date. The Court has the discretion to grant or deny the motion to strike. *Canady v. Erve Elektromedizin GmbH*, 307 F. Supp. 2d 2, 7 (D. D.C. 2004) (citing *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664-65 (7th Cir. 1992)). Motions to strike are generally disfavored, *RDF Media Ltd. V. Fox Broadcasting Co.*, 372 F. Supp. 2d 556, 566 (C.D. Cal. 2005), and as a matter of policy, courts prefer to resolve a case on the merits. Consistent with that policy, this Court prefers to have all of the parties' arguments before it. Therefore, the motion to strike is DENIED.

CONCLUSION

Summary Judgement is **DENIED** as to the section 1983 claims and the trespass claim, except to the extent that the unidentified officers are granted qualified immunity. The plaintiffs' motion to strike is also **DENIED**.

IT IS SO ORDERED.

DATED this 31st day of October, 2007.

Ronald B. Leighton
RONALD B. LEIGTON
UNITED STATES DISTRICT JUDGE